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P.O. Box 1713, W. Sacramento, CA 95691

January 17, 2003

To: Patti Kroen and ALL Members of the Plenary Group
Project: California Department of Water Resources Relicensing of the SWP's Oroville Facilities
Subject: Issues of Concern and Need of Clarification and Interpretation at the Plenary Level

Faxed To: 530-753-1119

In accordance with the Communication Protocols, **Porgans & Associates (P&A)** is submitting this request as an Action Item to be discussed at the Plenary's January 28th meeting, and to have the issues placed on the Plenary's February 25th meeting agenda.¹

Reason, Need and Purpose for this Request: The reason that the issues need to be discussed is primarily the result of an ongoing and yet to be resolved controversy that repeatedly surfaces at almost every Plenary meeting; fundamental concerns and issues that have and continue to be raised by its members are in need of clarification. P&A's sole purpose for our request to have these matters discussed at the Plenary Group meeting is in the interest of ensuring the ultimate success of the Alternative Licensing Procedures (ALP).

Background: In June 2000, the California Department of Water Resources' (DWR) held a public meeting to advise the public of its intention to renew its Federal Energy Regulatory Commission (FERC) License 2100 issued for the State Water Project's (SWP) Oroville Facilities, using FERC's Alternative Licensing Procedures (ALP). The ALP is termed as a "collaborative process" enabling all of the vested interests to participate on equal footing; where by decisions are made by "consensus." Since mid-2000, the project participants (public and private sectors) have been under extreme duress to maintain the grueling pace required to participate in the ALP. The ALP is a seven-year process, which is complicated by the fact that it is a relatively new relicensing tool. It is an understatement to say that this is a major undertaking.

Albeit, the DWR's schedule is driven by regulatory protocols, demands and time-specific filing deadlines. The ALP provides input from a vast array of public and private participants; it identifies, compiles and disseminates vast amounts of data; it has developed more than 70 study plans; already held hundreds of meetings, and maintains interaction and communication with a divergent group of project participants, all of whom are to be commended. **Nevertheless, this effort has not been without its shortcomings, conflicts and ambiguities which need to be reconciled ASAP, to the mutual benefit of all participants. If they are left unresolved, it could present a real threat to the success of the ALP and DWR's relicensing effort. In general, they are as follows:**

- ① Definition of Consensus
- ② Do the Non-government Participants Believe that the ALP is Transparent? How can we make it more transparent ?
- ③ Is the Process Working As Anticipated and Meeting ALL of the Participants Needs?
- ④ Do Local Public Participants Believe that Their Input is Meaningful and That Their Issues are Being Addressed by DWR?
- ⑤ Do Local Public Participants Feel that the Process is Getting Away from Them, i.e, Moving Target?
- ⑥ What is the Local Participants Level of Confidence in the ALP at this Time?
- ⑦ What is Local Participants Ability to Sustain Meaningful Participation in Light of Increasing Time Constraints and Demands?
- ⑧ Are the Time Frames Realistic for the Development of Guidance Document Protocols (PM&E's - Cumulative Impacts, etc)?
Are They All Encompassing or Pre-emptive and/or Consistent with Federal and State Requirements?
- ⑨ How are Participants to Provide Meaningful Input and Participation if Information Received from DWR is Lacking in Basic Definitions?
- ⑩ How to Reconcile any and/or All of the Aforementioned Issues and/of Concerns to the Satisfaction of the Participants.

Note: The aforementioned items are reflective of the general issues and concerns raised, heretofore, by different members of the Plenary Group, and have yet to be resolved.

¹ **Porgans & Associates (P&A)** provided Ms. Kroen with an initial draft, containing much more details, on Oct. 22, 2002. She was to provide a copy to ALL Members of the Plenary of it and this final rendition.

1 Feb. 19 Updated Version from Jan. 17 2003 Fax/Letter Distributed at Jan. 28, 2002 Plenary Meeting:

2 Note: The purpose of agendaizing the 10 "Issues of Concern and Need of Clarification and Interpretation" at
3 the Plenary Level, referenced in Porgans & Associates, Inc., January 17, 2003, letter to Patti Kroen, ALP Facilitator,
4 and ALL Members of the Plenary Group, is a **good-faith effort to ensure the success of the ALP and to avoid**
5 **a "Collaborative Process Breakdown."** ² The following issues and/or concerns are reflective of the general issues
6 and concerns raised heretofore, by different members of the Plenary Group, and have yet to be resolved. The ALP
7 was promoted as a forum for the public to have meaningful input (all inclusive); however, as the process has unfolded
8 to date, real meaningful participation is only affordable to those who are being paid. Many of these issues have
9 been raised from the very outset; however, we proceeded in good faith with the impression that they would
10 be resolved over the course of the last two years; unfortunately, they have not been resolved.

11 Background/Update: In accordance with the Process Protocols, during Jan. 28, 2003 Plenary meeting, the issues
12 contained in P&A's letter were discussed as an "Action Item." At which time it was agreed to, without exception,
13 to place the matter on the Plenary Group's February 26 agenda for discussion at that meeting. All of the Plenary
14 participants at that January meeting was apprized that they could submit their respective input to Ms. Kroen. On
15 Feb. 14, P&A telephoned Ms. Kroen to inquire if she had received any input and/or feedback from members of the
16 Plenary Group on this subject matter. Ms. Kroen stated that no one contacted her on this subject. During that
17 conversation she was informed that a number of the Oroville residents, who also are members of the Plenary Group
18 had made contact with P&A to express their views and provide input. Ms. Kroen was also informed that in the
19 interest of time, P&A scheduled a meeting with the local participants from Oroville, many of whom had expressed
20 similar concerns and/or support to have the matter discussed before the Plenary. P&A asked Ms. Kroen if it would
21 be appropriate and/or helpful to compose the collective thoughts of those who attend the February 15 meeting.
22 Mr. Kroen said that a written synopsis would be helpful.

23 Synopsis: The following is a synopsis of the comments and input generated at the meeting P&A had with eight Plenary
24 Group participants from the Oroville area. Please be advised that we used the 10 issues referenced in P&A's letter
25 as the basis for the discussion, which were agreed upon in unison, and the responses are as follows:

26 ① Definition of Consensus:

27 *"In this relicensing process, the Process Protocols adopt FERC's definition in its ALP rulemaking wherein*
28 *consensus is defined as the (weight of) overriding opinion."*³

29 Response: The issue of defining consensus has been raised time and again at the Plenary level by the Tribes, P&A
30 and other Plenary Group participants, and was never reconciled. We unanimously agreed that the meaning of
31 Consensus, contained in the *Process Protocols*, needs to be defined and clarified, as written, the language is vague
32 and ambiguous. Whether or not this was an oversight or intentional is irrelevant; albeit, it is disrupting the process.

**33 It states in the *Process Protocols*, I., G., Revision of *Process Protocols*. "*The Process Protocols may be revised as*
34 *appropriate by agreement among participants.*"**

² California Department of Water Resources, Oroville Division, State Water Facilities, FERC Project
No. 2100, *Process Protocols* IV., E., *Process Issues*, Approved May 1, 2001. p. 17.]

³ *Ibid.*, IV., D., *Decision Making*, p. 16.

1 **Recommendation:** Amend the Process Protocol definition so as to include the following changes in the language:

- 2 A. Identify specifically which participants at the Plenary "weigh in" when consensus is being determined.
- 3 B. Clarify if DWR's or the SWP contractors' consultants are inclusive in the "weight of" overriding
- 4 opinion.
- 5 C. Consensus should be by a verbal poll and not a "negative poll."
- 6 D. Process Protocols need to clarify that DWR's weight in consensus does not independently include each
- 7 of its employees present at the Plenary; i.e., it has one vote. Albeit, recognizing DWR's claim that
- 8 it has given itself the overriding authority even if consensus is in favor of a particular action.
- 9 E. In order to avoid any future ambiguity during times when a consensus is requested, all consultants
- 10 and non "voting" persons attending Plenary meetings should be seated away from the main table.

11 It states, in the Protocol Procedures, II. Section C. Purpose and Mission, p.6.), *"Responsibility for the*

12 *Collaborative Team's approval of study plans and PM&E proposals rests with the Plenary Group."*

13 **Response:** There is a noticeable pattern by the DWR and its SWP contractors to make changes in Plenary approved

14 study plans and/or other actions, without bringing the matter back to the Plenary for discussion and/or approval.

15 Participants can expound on examples during the Plenary meeting.

16 **Recommendation:** We respectfully suggest that the Process Protocols include a provision that states unequivocally

17 that once the Plenary Group approves a specific action and/or plan, that action and/or plan will remain intact, and

18 any material change in either will require notification to the Plenary, and at its discretion the group can determine

19 if the action needs to be brought back for re-review of any proposed change.

20

21 ② **Do the Non-government Participants Believe that the ALP is Transparent? How can we make it more**

22 **transparent ?**

23 **Response:** It is our position, based on our involvement, that the "real decision making process" is taking place outside

24 the Plenary. The predominant actions driving the ALP process is now in the hands of Task Force participants,

25 predominately composed of paid government employees and/or government consultants, eroding meaningful oversight

26 and/or input from local non-salaried participants. The department, its contractors and their respective consultants

27 have the distinctive financial advantage of actively participating in the plethora of studies and myriad of Task Force

28 and Work Group meetings, a privilege not afforded to local.

29 **Recommendation:** Develop a level-playing field and provide financial assistance to locals. Also, provide the Plenary

30 with a complete breakdown of all the funds expended to date by DWR, other government agencies and the water

31 contractors for the FERC relicensing effort; please identify sources of funds.

32 ③ **Is the Process Working As Anticipated and Meeting ALL of the Participants Needs?**

33 **Response:** No. Participation is relative to extraordinary demands for voluntary unpaid involvement and the intense

34 and demanding schedule, data review, and seemingly never ending meetings. Conversely, those participants that are

35 being paid to participate have and continue to mold and direct the process.

36 **Recommendation:** Funding sources should be made available for Tribes, ORAC, non-profit organizations and

37 individuals who have a proven track record of committed participation in the "collaborative process." More

1 importantly, there should be no "strings attached" to this type of funding, if it becomes available.

2 **④ Do Local Public Participants Believe that Their Input is Meaningful and That Their Issues are Being**
3 **Addressed by DWR?**

4 **Response:** Yes and No. In some cases it appears that the process is meeting some of the needs and issues raised;
5 however, there are too many uncertainties to have any real level-of-confidence as to whether or not they will be
6 acted upon. Notwithstanding, the majority of the issues and concerns that we have collectively raised have
7 essentially been lost in the process or ignored.

8 **Recommendation:** In order to remedy this inherent shortcoming in the existing process, we respectfully request that
9 the Process Protocols include a provision that requires the DWR to respond to legitimate issues, when raised, in a
10 timely and meaning manner.

11 **⑤ Do Local Public Participants Feel that the Process is Getting Away from Them, i.e., a Moving Target?**

12 **Response:** As stated above, the process is extremely demanding and beyond the capacity of volunteers to realistically
13 participate; it is paramount to a moving target.

14 **Recommendation:** Refer to number 3.

15 **⑥ What is the Local Participants Level of Confidence in the ALP at this Time?**

16 **Response:** Level-of-confidence has and continues to be undermined by what appears to be pre-determined decisions-
17 making outside of the collaborative process.

18 In addition, the Process Protocols (p. 14) states: *The facilitator has a primary role of promoting the success of the*
19 *collaborative process. ... The facilitator will adopt a proactive leadership style as the champion of the Oroville Facilities*
20 *relicensing process; the facilitator works for "the process" and no particular agency or interest group.* Nevertheless,
21 the (facilitator(s) actions revealed an inherent bias leaning in favor of DWR and the SWP contractors. If the
22 facilitator(s) cannot establish a meaningful balance in the ALP, it could jeopardize the success of the collaborative
23 process, which may require replacement facilitators.

24 **Recommendation:** Ensure full disclosure pertinent to DWR and SWP contractors activities and adhere to a strict
25 policy of absolute "transparency." Direct the facilitators to conduct their actions in a fair and unbiased manner.

26 **⑦ What is Local Participants Ability to Sustain Meaningful Participation in Light of Increasing Time**
27 **Constraints and Demands?**

28 **Response:** Unrealistic and practically impossible.

29 **Recommendation:** Refer to number 3.

30 **⑧ Are the Time Frames Realistic for the Development of Guidance Document Protocols (PM&E's - Cumulative**
31 **Impacts, etc)? Are They All Encompassing or Pre-emptive and/or Consistent with Federal and State**
32 **Requirements?**

1 **Response:** Time frames are unrealistic, too demanding, which is further impaired by the fact that the guidance
2 documents for the cumulative impacts and the PM&Es are deficient, problematic, possibly pre decisional and may be
3 inconsistent with federal and state laws. Please refer to P&A's comments to the Process Task Force, Dec. 20, 2002.
4 (Attachment 1.)

5 P&A has and continues to support many of the comments and concerns expressed by federal agencies participating
6 in the ALP with statutory authority i.e., USFWS, NOAA, NMFS, in their respective correspondences to the
7 Department, pertaining to the intrinsic shortcomings and limitations imposed in guidance documents. In particular
8 those stated in the December 16, 2002, letter to Kerns & West from USFWS pertaining to the PM&Es and the joint
9 letter from the federal agencies to Henry "Rick" Ramirez, dated Dec. 2, 2002, regarding cumulative impacts. The
10 USFWS's Dec. 16 letter states the following:

11 **Feds Comments, p 2, para. 1: Action/Timetable:** *The time line presented in this document does not*
12 *adequately reflect the needs of the agencies, and others, to develop PM&E measures, given that many studies*
13 *are not yet completed and will not be available for review, much less development of PM&E measures, by*
14 *either April 2003, or June 2003, deadlines set forth in this schedule. "...limitations should not be put on*
15 *PM&Es."*

16 **Feds Comments, p. 3, para. 1:** *Because of this need, the timing reflected in the proposed schedule is*
17 *inappropriate, as the participants cannot identify all project impacts, much less PM&E measures, until study*
18 *results are available. To do otherwise forces the participants to base PM&E measures on inadequate*
19 *information.*⁴ (Attachment 2.)

20 As P&A had repeatedly stated, during the Task Force Guidance Document meetings (Attachment 1), and for reasons
21 stated by the USFWS and other government agencies, it could not sign off on the PM&E Guidance Document as
22 drafted. This is the same position P&A took on the **Cumulative Impacts Guidance Assessment Document**, which was
23 also in line with the respective federal agencies position. As some of you may recall, the stated position of the
24 respective federal agencies, in their Dec. 2, 2002, letter to Rick Ramirez, is as follows, and I quote:

25 Page 1, para 2: *"NOAA Fisheries reviewed DWR's Guidance Document and found the DWR's purpose*
26 *and intent in advancing an alternative scoping document unclear. The DWR's document defines and*
27 *restricts what information the Services will need to administer their prescriptive and consultive*
28 *authorities."* [Emphasis added.]

29 Page 1, para 3: *"Regarding cumulative impact assessment, the DWR's Guidance Document incorrectly*
30 *combines NEPA, ESA, and CEQA definitions of cumulative impacts."* [Emphasis added.]

31 Page 2, para 2: *Regarding the geographic scope of impacts, the DWR's Guidance Document arbitrarily*
32 *designates the limits of impacts to listed species (action area) without technical or scientific basis. In doing*
33 *so, DWR attempts to predestine the outcome of studies. This implies limits on the depth and thoroughness*
34 *of the analyses, making a scientific assessment of the impacts impractical.* [Emphasis added.]

35 Page 2, para 4: *Our concern is that DWR develops an adequate administrative record upon which to base*
36 *our prescriptions and recommendations within statutory filing deadlines. An incomplete license application*

⁴ Gary Taylor, U.S. Fish & Wildlife Service Memorandum to Avani Khanna, Kerns & West, Subject:
Comments on Process Task Force Guidance Document, Dec. 5, 2002, Oroville Project, Dec. 16, 2002, pp. 1 - 2.

1 *may lead to additional information requests or other administrative delays. In turn, a lengthy delay in issuing*
2 *a new license may result in irreparable harm to sensitive resources through the ongoing impacts of current*
3 *project facilities and operations.*⁵ (Attachment 3.)

4 In essence those federal agencies listed above could not sign off on the Cumulative Impact Assessment
5 Document and also appear to have real concerns regarding issues relating to PM&Es. DWR needs to come
6 to grips with the intrinsic shortcomings, restrictions and/or conflicting attributable to cumulative impacts,
7 base case/pre-existing conditions, range of PM&Es, which are problematic, and need to be resolved and
8 the regulatory/statutory of its pay more attention to

9 **Recommendation:** DWR needs to reconcile those concerns raised by the federal agencies, P&A and other ALP
10 participants. In particular those comments and concerns included in the federal agencies Dec. 2 and Dec. 16, 2002
11 pertaining to the PM&Es and the Cumulative Impacts.

12 **⑨ How are Participants to Provide Meaningful Input and Participation if Information Received from DWR is**
13 **Lacking in Basic Definitions?**

14 **Response:** Define terms such as consensus, baseline, existing conditions, range of impacts, APE, no budget, etc.

15 **Recommendation:** Provide clear and unambiguous definitions and adhere to them. Respond to questions in a meaningful
16 and timely manner.

17 **⑩ How to Reconcile any and/or all of the Aforementioned Issues and/or Concerns to the Satisfaction of the**
18 **Participants.**

19 **Recommendation:** We are requesting meaningful responses and/or action on DWR's behalf to respond to the issues,
20 concerns and request for information within 30 days of each request. Should the Department fail to respond in a
21 meaningful and/or timely manner, then we will consider instituting a formal dispute resolution, in accordance with
22 the *Process Protocols*, IV., D., (Dispute Resolution), and/or exhaust the administrative remedy.

23 **Concluding Statement/Position:** As participants in the collaborative process we have no intention of allowing any
24 other person and/or entity to participate as any of our representatives on those issues that we have raised and/or
25 shepherdized in the ALP. Furthermore, unless these fundamental concerns and/or issues are resolved to our
26 satisfaction we will not be able to "live with" the process.⁶

27 **Request for Written Response:** We await your response and are hopeful that the aforementioned matters/issues
28 can be resolved. Please place a copy of this correspondence and the attachments into the "Public Reference File."
29 Also be advised that a copy of this correspondence is being sent to FERC and other interested parties. Thank you.

cc: Interested Parties

⁵ Miles Croom, Northern California Habitat Manager, letter to Henry M. Ramirez, Manager, Oroville Relicensing Program, Re: Joint National Marine Fisheries Service and U.S. Fish and Wildlife Service Presentation on Scope of Environmental Analysis for the Oroville Hydroelectric Project Relicensing (FERC No. 2100), Dec. 2, 2002.

⁶ Process Protocols, II., A., p. 5.

ATTACHMENTS

Attachment 1

P&A's Comments to the Process Task Force, Dec. 20, 2002. (Total of two pages.)

Attachment 2

Gary Taylor, U.S. Fish & Wildlife Service Memorandum to Avani Khanna, Kerns & West, Subject: **Comments on Process Task Force Guidance Document**, Dec. 5, 2002, Oroville Project, Dec. 16, 2002. (Total of five pages.)

Attachment 3

Miles Croom, Northern California Habitat Manager, letter to Henry M. Ramirez, Manager, Oroville Relicensing Program, Re: **Joint National Marine Fisheries Service and U.S. Fish and Wildlife service Presentation on Scope of Environmental Analysis for the Oroville Hydroelectric Project Relicensing (FERC No. 2100)**, Dec. 2, 2002. (Total of 12 pages.)

December 20, 2002

Re: Comments to Process Task Force Guidance Document "Guidance Document for PM&E Proposals"

First, I would like to ask a question as a point of clarification: Are the comments contained within Dec. 18, 2002, Kearns & West Draft PM&E Guidance Document intended to be reflective of the input that it received from those members of the Task Force that it contacted, subsequent to the Nov. 25, 2002 meeting?

P&A's Response: For the record P&A is compelled to state that the input I provided to K&W is not reflective in this draft, which is very disconcerting and necessitates the formal submittal of P&A's written comments which it expects to be included, unabridged into the draft and/or final document.

P&A has been actively involved in DWR's FERC relicensing since day one. While we commend the department and others participating in the so-called collaborative process, P&A has witnessed/experienced many of the intrinsic shortcomings in the various protocol documents that have heretofore been composed in haste, which have and continue to generate conflict and undermine confidence in the process; i.e., consensus has yet to be defined.

To my knowledge, Porgans & Associates have participated in ALL of the Process Task Force meetings. In each of the meetings, P&A has repeatedly stated the following position and/or concerns regarding the "development and framing" of the Guidance Document for PM&E Proposals.

- ① The time-frame/scheduled for the developing-framing Guidance Documents are not realistic.
- ② The process is moving too fast to provide for meaningful input.
- ③ It is unrealistic to develop PM&E's without first identifying the range of impacts and/or completing studies.
- ④ The draft language heretofore, in some instances have been too restrictive, ambiguous and leaves too wide a range for interpretation and disputes;
- ⑤ As it is written the document is preemptive, limiting and problematic;
- ⑥ P&A has and continues to support many of the comments and concerns raised by the federal agencies; i.e., USFWS, NOAA, NMFS, in their respective correspondences to the Department, pertaining to the intrinsic shortcomings and limitations imposed in guidance documents.

Feds Comments, p 2, para. 1: Action/Timetable: The time line presented in this document does not adequately reflect the needs of the agencies, and others, to develop PM&E measures, given that many

studies are not yet completed and will not be available for review, much less development of PM&E measures, by either April 2003, or June 2003, deadlines set forth in this schedule. "...limitations should not be put on PM&Es.

Feds Comments, p. 3, para. 1: Because of this need, the timing reflected in the proposed schedule is inappropriate, as the participants cannot identify all project impacts, much less PM&E measures, until study results are available. To do otherwise forces the participants to base PM&E measures on inadequate information.

⑦ As P&A has repeatedly stated, it is for all of the aforementioned reasons that it cannot sign off on the PM&E Guidance Document as drafted. This is the same position P&A took on the Cumulative Impacts Guidance Assessment Document, which was also in line with the respective federal agencies position. As some of you may recall, the stated position of the respective federal agencies, in their Dec. 5, 2002 letter to Rick Ramirez, and I quote:

Page 1, para 2: " NOAA Fisheries reviewed DWR's Guidance Document and found the DWR's purpose and intent in advancing an alternative scoping document unclear. The DWR's document defines and restricts what information the Services will need to administer their prescriptive and consultive authorities."

Page 2, para 1: "Regarding cumulative impact assessment, the DWR's Guidance Document incorrectly combines NEPA, ESA, and CEQA definitions of cumulative impacts."

Page 2, para 3: Regarding the geographic scope of impacts, the DWR's Guidance Document arbitrarily designates the limits of impacts to listed species (action area) without technical or scientific basis. In doing so, DWR attempts to predestine the outcome of studies. This implies limits on the depth and thoroughness of the analyses, making a scientific assessment of the impacts impractical.

Page 2, para 4. Our concerns is that DWR develop an adequate administrative record upon which to base our prescriptions and recommendations within statutory filing deadlines.

In essence they could not sign off on the Cumulative Impact Assessment Document.

Hand Delivered to Avani Khanna At the PM&E meeting.

Southwest Region
National Marine Fisheries Services
777 Sonoma Avenue, Room 325

December 2, 2002 F/SWR4:SAE

Henry M. Ramirez, Manager
Oroville Facilities Relicensing Program
Department of Water Resources
1416 Ninth Street, Box 942836
Sacramento, CA 94236

Dear Mr. Ramirez

This concerns the Oroville Hydroelectric Project relicensing (FERC No. 2100). The National Marine Fisheries Service (NOAA Fisheries) is participating in the Alternative Licensing Process (ALP) for the Oroville Project. During the ALP meetings, Division of Water Resources (DWR) and its Water Contractors requested the U.S. Fish and Wildlife Service and NOAA Fisheries (Services) to make a presentation to the ALP environmental working group on scoping. Specifically, the Services were requested to clarify agency positions on the scope of studies necessary to support the National Environmental Policy Act (NEPA), Endangered Species Act (ESA) and Federal Power Act (FPA) informational requirements for relicensing. In response to DWR's request, the attached document, (Scoping Document) was prepared and provided by the Services to the ALP during the September 2001, presentation on scoping. In summary, the Scoping Document defines the regulatory framework for determining required scope of studies pursuant to NEPA, ESA and the FPA. The Services did not receive comments on the Scoping Document or presentation. Accordingly, by letter dated October 11, 2001, NOAA Fisheries filed the Scoping Document with the Federal Energy Regulatory Commission (FERC) and DWR.

In June 2002, DWR and its Water Contractors prepared and DWR adopted the *Cumulative Impact Assessment Guidance Document* (Guidance Document). The Guidance Document defines the limits and scope of studies necessary for the Services to meet their regulatory and informational requirements for the Oroville relicensing. DWR requested NOAA Fisheries' comments on the Guidance Document. NOAA Fisheries reviewed DWR's Guidance Document and find DWR's purpose and intent in advancing an alternative scoping document unclear. DWR's document defines and restricts what information the Services will need to administer their prescriptive and consultative authorities. However, it is the Services who are responsible for determining what information will be necessary to administer their authorities and for conveying this information to the applicant and FERC. It is towards that end that NOAA Fisheries recommends studies through the relicensing process.

Regarding cumulative impact assessment, DWR's Guidance Document incorrectly combines

NEPA, ESA and CEQA definitions of cumulative impacts. It is important to identify the different statutory authorities, so that it is clear what information will be expected for the Service's Biological Opinions. Also, care should be taken to avoid confusing the distinction between direct and indirect impacts of the project and cumulative impacts. These are two very different concepts under both NEPA and the ESA. Indirect impacts are causally linked to the project and therefore, must be considered as resulting from the proposed action. Cumulative impacts are not causally linked to the project, but must be accounted for in determining project effects on the listed species. For additional explanation, please see the attached Scoping Document.

Regarding the geographic scope of impacts, DWR's Guidance Document arbitrarily designates the limits of impacts to listed species (action area) without technical or scientific basis. In so doing, DWR attempts to predestine the outcome of studies. This implies limits on the depth and thoroughness of the analyses, making a scientific assessment of the impacts impractical. The description of the action area in the attached Scoping Document is correct and should be used for guidance.

The DWR Scoping Document also includes a discussion of how impacts to listed species will be judged by considering "overall" effects. Overall effects would be calculated through a process of "offsetting" negative impacts by beneficial impacts to achieve "overall" effects. Please be aware, the ESA consultation regulations do not allow for a determination of no adverse impacts on listed species based on a "netting out" of positive and negative impacts. Likewise, mitigation that takes the form of compensation for unavoidable impacts does not serve to lessen the impacts that must be considered under the jeopardy analysis.

Our concern is that DWR develop an adequate administrative record upon which to base our prescriptions and recommendations within statutory filing deadlines.¹ An incomplete license application may lead to additional information requests or other administrative delays. In turn, a lengthy delay in issuing a new license may result in irreparable harm to sensitive resources through the ongoing impacts of current project facilities and operations.

Thank you for your cooperation in the above. If you have questions concerning these comments, please contact Mr. Steve Edmondson at (707) 575-6080.

Sincerely,

Miles Croom
Northern California Habitat Manager

¹ 18CFR16.8

cc: Secretary, FERC, ES-1 (8-copies)

Mike Aceituno - NMFS, Sacramento

Bruce Oppenheim - NMFS, Sacramento

Gary Taylor - FWS, Sacramento

enclosure

**Joint National Marine Fisheries Service and
U.S. Fish and Wildlife Service Presentation on
Scope of Environmental Analysis for the
Oroville Hydroelectric Project Relicensing.
(FERC No. 2100)**

SCOPE OF OROVILLE RELICENSING

The scope of the proposed action is FERC's issuance of a new license to the State of California Department of Water Resources (DWR) to operate the Oroville Hydroelectric Project (FERC No. 2100) and appurtenant facilities. When FERC considers whether to re-license a hydropower project, it must review the project to ensure it is best adapted to a comprehensive plan for, among other things, the adequate protection, mitigation and enhancement of fish and wildlife, including related spawning grounds and habitat.

Project Purpose

According to the Initial Information Package (IIP) for the Oroville Project relicensing, the Project purposes are described as: "*a multipurpose water supply, flood control, power generation, recreation, fish and wildlife, and salinity control project.*". Further, Project operations are specifically managed as follows: "*On a weekly basis, [Project] releases are scheduled to accommodate water supply requirements, water quality and quantity requirements in the Sacramento-San Joaquin Delta, instream flow requirements in the Feather River, power requirements, and minimum flood control space.*"²

Scope of Consultation Under section 7 Endangered Species Act.

Contents of Initiation Package

Formal consultation is necessary if the federal action "may affect" listed species. Although there is no specific time frame for submitting an initiation package, agencies must review their actions "at the earliest possible time" to determine whether formal consultation is required. If a "may affect" situation exists, formal consultation must be initiated promptly. The joint NMFS and U.S. Fish and Wildlife Service, Endangered Species Act Handbook at page 4-4 (1997) states that:

To comply with the section 7 regulations (50 CFR §402.14(c)), the initiation package is submitted with the request for formal consultation and must include, all of the following:

- *a description of the action being considered;*
- *a description of the specific area that may be affected by the action;*
- *a description of any listed species or critical habitat that may be affected by the action;*
- *a description of the manner in which the action may affect any listed species or critical habitat, and an analysis of any cumulative effects;*
- *relevant reports, including any environmental impact statements, environmental assessments, biological assessment or other analyses prepared on the proposal; and*
- *any other relevant studies or other information available on the action, the affected listed species, or critical habitat.*

² State of California, The Resources Agency, Department of Water Resources. *Federal Energy Regulatory Commission License Project No. 2100. Initial Information Package; Relicensing of the Oroville Facilities.* January, 2001.

The joint Handbook in the section "Determining the effect of ongoing water projects" (at 4-28) states that when analyzing the effects of ongoing federal discretionary operations of water projects and water contracts, the Services' are to approach their analysis in the same way that they would analyze a new license or contract, thus considering:

- *The total effects of all past activities, including effects of the past operation of the project, current non-federal activities, and Federal projects with completed section 7 consultations, form the environmental baseline; [emphasis in original]*
- *To this baseline, future direct and indirect impacts of the operation over the new license or contract period, including effects of any interrelated and interdependent activities, and any reasonably certain future non-Federal activities (cumulative effects), are added to determine the total effect on listed species and their habitat.³*

Action Area

The "action area" is defined as "*all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action*" (50 CFR 402.2).

Cumulative Impacts

Cumulative effects include the effects of future State, tribal, local or private actions that are reasonably certain to occur in the action area considered in this biological opinion. Future Federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to section 7 of the Act.

Critical Habitat

The FERC described its responsibilities to analyze and document project impacts on listed species and critical habitat in its February 1993 document titled: HYDROPOWER LICENSING AND ENDANGERED SPECIES - Procedures for Complying with the Endangered Species Act.⁴ Under the heading, *Critical Habitat*, FERC details its responsibilities as follows:

Our findings dealing with critical habitat are made independent of the effect on known

³As defined in 50CFR402:

Indirect effects

Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur.

Interrelated actions

Interrelated actions are those that are part of a larger action and depend on the larger action for their justification.

Interdependent actions

Interdependent actions are those that have no independent utility apart from the action under consideration.

⁴ FERC Paper No. DPR-7

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individuals. Whether or not the critical habitat is occupied by the species is not a factor in determining effect.

Our analysis should consider the effects of the action on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species ("primary constituent elements"). These primary elements may include roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types (50CFR § 424.12). We also must look at the indirect effects of the proposed action on critical habitat located adjacent to the project area.

Interagency Task Force (ITF) Report on Improving Coordination of ESA Section 7 Consultation with the FERC Licensing Process⁵

The ITF developed the following guidelines for determining the scope of a licensing action:

"Scope of Effects" of Proposed Action

Issues: The regulations on Section 7 consultation list examples of "action" as actions directly or indirectly causing modifications to the land, water, or air. Indirect effects are delayed effects caused by the proposed action which are reasonably certain to occur. The Service and FERC sometimes differ on the "scope of effects" of a proposed action. These differences concern whether the effects in question are reasonably related to the proposed action, and whether there is a "reasonable" likelihood that indirect effects may result from the proposed action.

Proposed Solutions:

- 1. Participants are encouraged to identify the scope of effects early in the FPA process thereby allowing sufficient time to adequately resolve concerns while avoiding delays that may otherwise result.*
- 2. In its cover letter transmitting its NEPA document or Biological Assessment, FERC will explain how it considered direct and indirect effects of the proposed action, any cumulative effects, and the effects of any interrelated or interdependent actions, as well as the basis for its findings.*
- 3. In assessing the adequacy of information provided, the Service will be as specific as possible about what effects or actions it believes FERC should have considered, or did not consider in sufficient detail.*

Prepared by the Work Group on the Coordination of Federal Mandates:
Federal Energy Regulatory Commission
U.S. Department of the Interior
U.S. Department of Commerce
U.S. Department of Agriculture
Environmental Protection Agency
Advisory Council on Historic Preservation

BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20250

National Environmental Policy Act

The National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*) is the foundation of modern American environmental protection in the United States and its commonwealths, territories, and possessions. The implementing regulations for NEPA require that Federal action agencies must analyze the direct and indirect environmental effects and cumulative impacts of project alternatives and connected actions.

The regulations emphasize agency cooperation early in the NEPA process. Section 1501.6. Section 1501.7 on "scoping" also provides that all affected Federal agencies are to be invited to participate in scoping the environmental issues and to identify the various environmental review and consultation requirements that may apply to the proposed action. Further, Section 1502.25(b) requires that the draft EIS list all the federal permits, licenses and other entitlements that are needed to implement the proposal.

Indirect Effects

The Council on Environmental Quality (CEQ) regulations under 40 CFR 1508.8 (b) defines indirect effects as effects "*which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include human population growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems*".

Cumulative Impacts

Cumulative impacts are those combined effects on quality of the human environment that result from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions, regardless of what Federal or non-Federal agency or person undertakes such other actions (40 CFR 1508.7, 1508.25(a), and 1508.25(c)). Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

Connected Actions

The CEQ regulations require "connected actions" to be considered together in a single EIS. See 40 CFR §1508.25 (a)(1). "*Connected Actions are defined, as actions that: (i) automatically trigger other actions which may require environmental impact statements; (ii) cannot or will not proceed unless other actions are taken previously or simultaneously; (iii) are independent parts of a larger action and depend upon the larger action for their justification.*"

DWR's operation and maintenance of its Oroville Project and resulting irrigation and other land use practices meet the above criteria for "Indirect Effects" "Cumulative Impacts" and "Connected Actions". For instance, DWR's facilities and operations are inextricably intertwined concerning the impoundment, release from storage, conveyance, and use of the waters of the Feather River.

Because of the potentially significant impact of relicensing on ESA listed species, and the significant controversy concerning water supply issues in California, the Service's believe that

FERC should prepare an Environmental Impact Statement (EIS) for the federal action of relicensing the Project.

Under § 102 (2) (c) of NEPA, a "detailed statement" of "alternatives to the proposed action" is central to the EIS and forms the basis for any subsequent Record of Decision. The EIS's analysis should be sufficiently detailed to reveal the agency's comparative evaluation of the environmental benefits, costs and risks of the proposed action and each reasonable alternative. NEPA's alternatives requirement is subject to a "rule of reason" and that necessarily governs which alternatives the agency must discuss, and the extent to which it must discuss them.⁶

Regarding the scope of specific studies, all studies must be sufficient to fully describe impacts of the proposed hydroelectric project license and alternatives. Studies designed to describe water quality, hydrology and other temporally and spatially broad parameters must include an analysis of project impacts extending downstream to the confluence with the ocean unless specific threshold analyses indicate otherwise. These studies must include direct, indirect and cumulative impacts. Similarly, records indicate that anadromous salmonids historically accessed stream habitats upstream of Lake Oroville. Therefore, absent information indicating that fish passage is technologically infeasible, would result in comparably greater negative impacts, or would provide lesser benefits to anadromous salmonids than other alternative enhancement measures, we must assume that access to historic habitats is necessary to meet our resource management goals and objectives for anadromous fish. The licensee must conduct adequate studies to fully develop a range of alternatives for providing fish passage including plans for restoring access to historic habitats.

CEQ Guidance on Determining Scope

In its report *Considering Cumulative Effects Under the National Environmental Policy Act* The CEQ developed the following guidelines for determining the scope of a licensing action:

Identifying Geographic Boundaries

For a project-specific analysis, it is often sufficient to analyze effects within the immediate area of the proposed action. When analyzing the contribution of this proposed action to cumulative effects, however, the geographic boundaries of the analysis almost always should be expanded. These expanded boundaries can be thought of as differences in hierarchy or scale. Project-specific analyses are usually conducted on the scale of counties, forest management units, or installation boundaries, whereas cumulative effects analysis should be conducted on the scale of

⁶ In its document, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations" the CEQ states: "The degree of analysis devoted to each alternative in the EIS is to be substantially similar to that devoted to the 'proposed action.'" Section 1502.14 is titled "Alternatives including the proposed action" to reflect such comparable treatment. Section 1502.14(b) specifically requires "substantial treatment" in the EIS of each alternative including the proposed action. This regulation does not dictate an amount of information to be provided, but rather, prescribes a level of treatment, which may in turn require varying amounts of information, to enable a reviewer to evaluate and compare alternatives." Id.

human communities, landscapes, watersheds, or airsheds. Choosing the appropriate scale to use is critical and will depend on the resource or system....

A useful concept in determining appropriate geographic boundaries for a cumulative effects analysis is the project impact zone.... For a proposed action or reasonable alternative, the analysts should

- Determine the area that will be affected by that action. That area is the project impact zone.
- Make a list of the resources within that zone that could be affected by the proposed action.
- Determine the geographic areas occupied by those resources outside of the project impact zone. In most cases, the largest of these areas will be the appropriate area for the analysis of cumulative effects.
- Determine the affected institutional jurisdictions, both for the proposing agency and other groups.

Project impact zones for a proposed action are likely to vary for different resources and environmental media. For water, the project impact zone would be limited to the hydrologic system that would be affected by the proposed action.

Federal Power Act

The Federal Power Act (FPA) under 16 U.S.C. s 797(e) states:

In deciding whether to issue any license, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

It is implicit that in order to provide for "protection, mitigate of damage to, and enhancement of fish and wildlife...." FERC must first evaluate environmental impacts. The FPA clearly distinguishes between the project boundaries and the environment affected by the project (action area). For instance, FERC's relicensing regulations at 18 CFR 16.8(b)(i) require that the applicant provide detailed maps of the project boundaries and at 16.8(b)(iv) the applicant must additionally provide an identification of the environment affected, or to be affected, and proposed mitigation. FERC wouldn't make these separate requirements of a description of the affected environment if it was the same as the project boundaries.

Further, in FERC's regulations stipulating what must be included in a license application, at 18 CFR 4.41(f)(3), FERC requires information on fish and wildlife "in the vicinity of the proposed project", not just the project boundaries. In 18 CFR 4.41(f)(3)(i), FERC requires a description of resources in the "proposed project area and its vicinity" and requires mitigation for impacts on fish and wildlife. Thus, FERC clearly distinguishes between the project area and the vicinity for purposes of considering impacts on natural resources.

Regulations governing the preparation of the license application require the inclusion of an Exhibit E. FERC's guidance on what must be in Exhibit E includes a summary of the resource agencies' views on resource needs in the project vicinity and region. This further confirms the absolute requirement to collect information on resources affected beyond the project boundaries.



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FAX TRANSMISSION COVER SHEET

Date: 12/16/02

To: Avani Khanna, Kearns and West

Tel. (415) 391-7900 ext 111

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Re: Process Protocols Comments

Sender: Gary Taylor USFWS

Total Pages (Excl. Cover): 4

Comments from USFWS on 12/5/2002 Process document.

December 16, 2002

Memorandum

To: Avani Khanna, Kearns & West

From: Gary Taylor, Fish and Wildlife Service

Subject: Comments on Process Task Force Guidance Document, December 5, 2002
Oroville Project

The following constitute the Fish and Wildlife Service's comments on the Process Task Force Guidance Document, which was distributed by e-mail on December 5, 2002, and by telefax to the Office of the Regional Solicitor on December 6, 2002.

Heading: Action Items (page 2)

The second bullet requests that participants are to provide "description of your organization's 'second table.' What is meant by the organization's second table?

In connection with this, the Service informs Kearns & West of the following intended participants:

Participation in Environmental work groups - Richard De Haven (Sacramento Fish and Wildlife Office), Jason Douglas (Sacramento Fish and Wildlife Office - Endangered Species issues), Caesar Blanco (Stockton Fishery Resource Office)
Engineering/Operations Work Groups - Derek Hilts (Sacramento Fish and Wildlife Office)
Plenary group - Mike Hoover (Sacramento Fish and Wildlife Office)
Process Task Force - Mike Hoover (Sacramento Fish and Wildlife Office)

Draft working document entitled "Guidance for Submitting PM&E Proposals"

Page 1 - The Service suggests that Kearns & West address this document to "Tribal Governments, Stakeholders and Work Groups ..." During the recent FERC meeting with Tribes concerning revisions to the licensing regulations, the Tribes were adamantly opposed to being grouped together with stakeholders.

Action/Timeline

The timeline presented in this document does not adequately reflect the needs of the agencies, and others, to develop PM&E measures, given that many studies are not yet completed and will not be available for review, much less development of PM&E measures, by either the April 2003, or June 2003, deadlines set forth in this schedule. Moreover, many studies are interrelated and results need to be considered together. Results of later studies may require modification of PM&Es submitted earlier, as a full picture becomes available. While it may be possible to approach topics early in a generic manner by setting general themes, at this preliminary stage, limitations should not be put on PM&Es.

Guidance for PM&E Proposals

The steps for this guidance should be revised as follows:

Additional background information is needed to clarify the purpose and assist the development of PM&E proposals. An introduction should be provided to the PM&E development process, that would include description and definition of PM&Es and their purpose, supported with reference to the laws, regulations, and policies that call for PM&E development, e.g., FPA, FWCA, ESA, NEPA, ITF documents, etc. Any excerpts, citas etc. should be included in each of the steps outlined below to support this PM&E development process.

1. Identify Agency/Entity Resource Mission, Goals, Objectives, Strategies, Policies

The next logical element would be a description of agency mission, goals, objectives, strategies, and policies as they relate to hydropower relicensing in general or specifically to this project. In "The Natural Resource Planning Survival Guide," prepared by the Department of the Interior and Oregon Fish and Wildlife (a copy of which has been provided to Kearns & West), the hierarchical arrangement and clear definitions of mission, goals, objectives, strategies and tasks/activities/actions are described (p. 14). It ultimately will be important that PM&Es are framed to the more detailed and specific level of objective so they are "enforceable and trackable" and can be crafted into license conditions by FERC staff. While objectives can be qualitative or quantitative, generally the PM&Es must be quantitative to be trackable and enforceable.

2. Identify Impacts of the Project on agency/entity goals and objectives

Describe how the project impacts agency/entity goals and objectives. Doing so will demonstrate where protection, mitigation and enhancement measures are necessary to address the impacts. This information should be derived from existing information or from studies, the results of which need to be made available to the agencies, tribes, and stakeholders to assist in

identifying project impacts. Because of this need, the timing reflected in the proposed schedule is inappropriate, as the participants cannot identify all project impacts, much less PM&E measures to address those impacts, until study results are available. To do otherwise forces the participants to base PM&E measures on inadequate information.

3. Identify potential PM&E measures

Identify measures needed to address the project impacts to goals and objectives, as described above. These measures should be framed in a manner that allows for FERC staff to incorporate them as license conditions with little modification. This requires a detailed level of specificity to meet the standard of "enforceable and trackable." This description should include as much detail as possible:

- a) any physical or operational changes required to address impacts;
- b) installation of equipment for monitoring compliance;
- c) other measures necessary to address impacts;
- d) anticipated outcome of the PM&E measures (restoration of habitat, etc.);
- e) describe how the PM&E meets the goals and objectives outlined above;
- f) alternative measures, if any, that could address same project impacts and result in similar environmental benefits;
- g) assess compatibility with other proposed PM&E measures; and
- h) identify which Work Group(s) should address the potential PM&E options and/or impacts on other resource areas.

* Note - It may be helpful to provide one or more examples of license articles taken from a recent License Order to demonstrate how PM&Es are correctly written.

The PM&Es from the resource agencies (USFS, BLM, NMFS, FWS, CDFG, BIA) and from tribes can also be preliminarily segregated into section 4(e), section 10(a), section 10(j), and section 18 compartments, as applicable.

4. Identify the PM&E category consistent with the Relicensing Process

Identify a potential category for the PM&E measure:

- a. FERC jurisdictional
- b. FERC non-jurisdictional
- c. mandatory agency condition (either FPA or CWA section 401)
- c. 10(a) recommendation (by agency, tribe, stakeholder, as applicable)
- d. 10(j) recommendation (by FWS or CDFG)
- e. Recommendation based upon other legal authorities.

5. Information Status - Describe the information status of the potential PM&E measure:

Include introductory paragraph explaining that the agency terms and conditions and

recommendations must be supported by substantial evidence in the record before FERC. While gearing the evidentiary process towards a settlement standard works if in fact the parties reach settlement, the evidentiary requirements for a settlement may differ from those required by the Commission to support an adjudicatory decision. Given the possibility that settlement may not occur, the agencies cannot predicate their information needs on a lesser evidentiary standard. The Commission regulations provide that for both mandatory terms and conditions, and recommendations, the evidentiary basis for the conditions (either mandatory or recommended) must be provided to the Commission. 18 C.F.R. 4.34(b)(1); 4.34(b)(2). The Commission's decision regarding all license conditions, including those submitted by agencies, must be supported by substantial evidence in the Commission record. See Bangor Hydro-Electric Company v. FERC, 78 F.3d 659, 662 (D.C. Cir. 1996); 16 U.S.C. § 825f. Accordingly, for those PM&Es that will form the basis for agency terms and conditions and recommendations, an evidentiary standard that is based upon the information needed for settlement is not adequate. The categories below have been altered to reflect this scenario.

- a. No more information is needed as there is sufficient information to meet the Federal Power Act's evidentiary requirements;
- b. No more information is needed because there are no evidentiary requirements for this subject area and information is sufficient for settlement;
- c. Additional information is necessary for a potential PM&E subject that will be gathered through the existing study plan;
- d. Additional information to support a potential PM&E subject is required because the existing study plan does not provide sufficient information to meet the Federal Power Act's evidentiary requirements. This additional information must be obtained through a new study plan or modifications to the existing study plan.

The Service has further altered the intent of this section, so that the information status is reflective of potential PM&Es, not developed PM&Es. Subsections c and d, above, would pose a difficulty if they referenced PM&E measures, as the submitter would be admitting that the condition or recommendation is not yet supported by substantial evidence. This, of course, would make that condition or recommendation potentially subject to challenge, as it would have been developed based upon supposition, not fact. Accordingly, the Service has changed the focus of these subsections to be the identification of potential PM&E subjects, where additional information is necessary before an actual PM&E may be developed.

Thank you for providing this opportunity to comment on the draft document.